IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL
CRIMINAL APPEAL NO. 153 of 2007
(Old No. 3087 of 1983)

1. Dhyan Singh S/o Gurmukh Singh
   R/o Sher Ghar, P.S. Doiwala, District Dehradun.
2. Malkhan Singh S/o Kutir Singh
   R/o Dadaon, P.S. Dadaon, District Aligarh. At present Sher Ghar
   P.S. Doiwala, District Dehradun.

..... Appellants

Versus

The State

.....Respondent

Sri Parikshit Saini, learned counsel for the appellants
Sri Harish Pujari, learned Addl. G.A. for the State

Dated: August 27, 2007

HON. DHARAM VEER, J.

This appeal preferred, under Section 374(2) of The Code of Criminal Procedure, 1973 (*hereinafter to be referred as Cr.P.C.*), is directed against the judgment and order dated 12/13.12.1983 passed by Additional Sessions Judge, Dehradun in Session Trial No.50 of 1983, State Vs. Dhyan Singh & others whereby, the learned Additional District and Sessions Judge has acquitted the co-accused Guljar Singh and Baldev Singh and has convicted the present appellants Dhyan Singh and Malkhan Singh (now deceased) under section 394 read with Section 398 of the Indian Penal Code 1860, (*hereinafter to be referred as IPC*) and sentenced them to undergo sentence for seven years R.I. each for offence u/s 394 r/w 398 IPC.

2. CJM, Dehradun vide his report dated 4.7.2007 has informed that Appellant No.2-Malkhan Singh has died, hence the appeal against Appellant No.2- Malkhan Singh stands abated.

3. In brief, the prosecution case is that on 8.12.82 at 9.45 PM, Sub Inspector Pati Ram Arya along with Constable Rajveer Singh and Sunder Lal were going in a truck No.UTL-7510 from Doiwala to Nepali Farm. When they reached Chidderwala, the road was blocked after putting the stones on the road. When the truck was stopped due to the blockage, then four robbers came there and asked the driver of truck to give them whatever they had. Sub-Inspector Pati Ram Arya

along with police Constables warned the robbers and then they ran away from there. The police party had chased them and caught hold two robbers namely present appellant Dhyan Singh and Malkhan Singh (deceased) who were armed with the spear and *Khukhri* and the other accused persons who ran away from the spot were Devi alias Baldev and other was Guljar alias Gauri. Devi alias Baldev was armed with a gun and Guljar was armed with a sword. With the same averments, the FIR Ex.Ka.4 was lodged by S.I., Pati Ram Arya on 9.11.82 at 1.10 AM at Police Station, Rishikesh and the recovered items spear and *khukhri* were deposited in the Police Station and the case was registered against the present appellants Dhyan Singh, Malkhan Singh and accused Guljar Singh and Devi alias Baldev under Section 393/307 IPC as case crime no.308/82.

4. The investigation of the case was entrusted to S.I., Matadin Yadav who had started the investigation and the recovery memo of the spear and *khukhri* was prepared on the spot by the S.I., Pati Ram Arya and that was signed by Constable Rajveer Singh and Sunder Singh, i.e. Ex.Ka.1. On the spot, four khokha cartridges of 12 bore were also recovered and a Fard was prepared by the Sub Inspector Pati Ram Arya on 8.12.82, i.e. Ex.Ka.2. The recovery memo of four *khoka* cartridges of .303 rifle and two *khokha* cartridges of .38 bore revolver were recovered. The said *khokha* cartridges were deposited in the police station and a Fard was prepared, that Fard is Ex.Ka.3. The police party started from the police station for patrolling on 8.12.82 at 16.30 PM. by G.D. Report No.29, the copy of report is Ex.Ka.5. Ex.Ka.6 is the copy of the G.D. no.18 prepared on 10.12.82 at 12.05 P.M. which shows the entry of S.I., Sri S.N. Sharma who had come back in the police station after completing his work at Moradabad. Ex.Ka.7 is the copy of G.D. No.28 dated 8.12.1982 time 16:00 hours. Ex.Ka.8 is the copy of G.D. No.3 time 1.10 AM on 9.12.82 which shows the entry of the Chik FIR registered in the police station. Ex.Ka.9 is the site plan of the place of occurrence prepared by the Investigating Officer on 9.12.82. During the course of the investigation, the Investigation Officer

has recorded the statement of witnesses and prepared the site plan and after completing the investigation he has submitted the charge sheet against the appellants Dhyan Singh and Malkhan Singh (deceased) and accused Baldev and Guljar under Sections 393/307 IPC i.e. Ex.Ka.10.

5. The Chief Judicial Magistrate, Dehradun after complying with the provisions of Section 207 Cr.P.C. have committed the case to the court of sessions under Section 209 Cr.P.C.

6. Learned Additional Sessions Judge, Dehradun has framed the charge against the appellants Dhyan Singh, Malkhan Singh and accused Guljar Singh and Baldev Singh under Section 394/398 IPC on 12.09.83. The charge was explained and read over to them who pleaded not guilty and claim to be tried.

7. To prove its case, prosecution has examined PW.1 Pati Ram Arya, PW.2 Sri Niwas Sharma, PW.3 Surjeet Singh and PW.4 Matadin Yadav. After that the statements of the appellants were recorded under Section 313 Cr.P.C. who had denied the allegations made against them, however they had not filed any documentary evidence in their defence but had examined one oral witness as D.W.1 Bakhtawar Singh.

8. After appreciating the entire evidence and hearing the counsel for the parties, the learned Additional Sessions Judge, Dehradun vide his judgment and order dated 12/13.12.1983 acquitted the accused Baldev Singh and Guljar Singh and convicted the appellants Dhyan Singh and Malkhan Singh (deceased) under Section 394 read with section 398 IPC and awarded sentence for seven years R.I. each. Against the judgment and order dated 12/13.12.1983, the present appeal has been filed.

9. I have heard Sri Parikshit Saini, learned counsel for the appellant and Sri Harish Pujari, learned Additional Government Advocate the State and perused the entire record of the case.

10. To prove its case prosecution has examined PW.1 S.I., Pati Ram Arya, who has stated in his statement that on

8.12.82 he was posted as Station Officer in Rishikesh. He was on patrolling duty from 6.00 PM to 12.00 PM in the night along with Constable Rajveer Singh and Sunder Lal. They were sitting in a truck at 9.30 PM and in the night they were patrolling on a truck from Doiwala to Chhidarwala road. When they reached in a kilometer between 20 to 21, then the road was blocked by the stones and the four persons were standing on both the sides of the road and the time was about 9.45 PM. when the truck reached near the stones then four robbers had come nearby the truck and asked the truck driver to stop the truck. The robbers came from both sides of road nearby the windows of truck and by showing the gun and spear, asked them to handover whatever they have got. When they saw the police inside the truck, they started to run away from the spot. After that the police party chased the robbers and then these robbers started to fire towards the police party, then this witness and the other police persons have also fired in self-defence. After chasing up to the certain distance, two robbers were caught hold by the police party and two robbers who had gun and sword in their hands had run away towards the forest. The two robbers who were caught hold on the spot had told their names as Dhyan Singh and Malkhan Singh (deceased). When the search was made then from the right hand of appellant Dhyan Singh, one spear was recovered i.e. Ex.1 and from the possession of deceased Malkhan Singh one Khukhri was recovered. The fard was prepared on the spot for the recovery of spear and *khukhri* i.e. Ex.Ka.1, and all the recovered items were sealed on the spot. On the date of the statement, the items were opened in the court, Khukhari is Ex.2 and clothes are Ex.3. The two persons who had ran away from the spot, they were also identified in the light of the torch of the truck. One was named as Devi and the other one was named as Gari alias Guljar and he has identified Guljar alias Gari in the court. Accused Guljar was armed with *sword* and Devi was armed with a gun and on the spot four used khokha cartridges of 12 bore gun were recovered. These cartridges were marked as Ex.4 to Ex.7 and a fard was prepared on the spot i.e. Ex.Ka.2. The cartridges which were used by the police

on the spot after firing, those were Ex.8 to Ex.13 and the fard was prepared on the spot i.e. Ex.Ka.3. After taking the accused persons and the case property, the police party had reached to the police station and the FIR was lodged in the Police Station, Rishikesh, which was written by the Head Mohharrir Jai Prakash, that F.I.R. is Ex.Ka.4. In the cross examination, he has stated that perhaps Surjeet Singh was driving the truck and Gurdeep was also sitting in the front seat. After that he has stated that the boy was driving the truck and the father was sitting behind him. He has further stated in para 13 that the night was dark. He further stated in para 15 when the police party has chased the accused persons, then the truck driver and his father had gone along with the truck towards Raiwala. He has further stated in para 17 that Sri Niwas Sharma had met him after about 2 to 4 days of the incident. He further stated in para 18 that in the F.I.R. Ex.Ka.4, Truck No.7510 UTL was written and S.I., Sri Niwas Sharma had told him the right truck number.

11. PW.2 Sri Niwas Sharma, who has stated that on 8.12.82 he was posted as S.I., in the Police Station, Rishikesh. On the same day, he had gone to Moradabad in relation to the investigation of some another case from Raiwala. He has gone to Moradabad on truck no.UTL8475 and in that truck limestone was loaded and that was also boarded for Moradabad and the truck was driven by Gurdeep Singh and his father Surjeet Singh was also sitting in the truck. He further stated that Surjeet Singh and Gurdeep Singh had told him that in Chhiderwala, four robbers have tried to rob them and one Sub Inspector and two constables were also sitting in the truck. In the cross examination, he has stated that the Investigating Officer has recorded the statement under section 161 Cr.P.C., on 1.01.83 and he has told the truck number 8475 to the Investigating Officer. He further stated that on that day he was on duty there was a Police Chowki in Raiwala and after Raiwala the next Police Station was in Haridwar on the way. He further stated that truck driver had Haridwar him about the above said incident in Raiwala. When he had entered in the truck, he was informed about the incident in

the Raiwala and he had not given any information to Raiwala Police Chowki. He has further stated that he had given the name of the driver and the conductor to the Investigating Officer on 01.01.83 and after completing the investigation, he came back from Moradabad on 10.12.82. From 10.12.82 to 01.01.83, he had not disclosed the names of the driver and conductor to anyone. He had not given this information to the Police Station, Rishikesh after coming back from Moradabad.

12. PW.3 Surjeet Singh, who has stated that the incident was happened on 8.12.82 and he was the owner of the truck no.8475 UTL. On that day he was going after loading the stones in the truck to Moradabad and his son Gurdeep Singh was with him. In Doiwala three police persons had met him and they boarded in the said truck. When they reached near Chhiderwala at about 10.00 PM, then they saw that the road was blocked with stones and as soon as the driver had stopped the truck after seeing the road blocked, then four persons had come from both the sides of the road. One was armed with rifle and others were armed with *Lathis* and spear. When they came near the truck and had seen the police persons inside the truck, then they ran away. On that the police persons chased the robbers. When they reached nearby the truck, they asked to handover whatever they have got. After seeing the police persons, the robbers had run away. When he reached Raiwala, another Sub Inspector had met him who had gone along with him up to Moradabad. He has further stated that he had told about the incident to that Sub-Inspector. In cross-examination, this witness has stated that three robbers were armed with *dandas* one had got the rifle and he had not seen the *khukhri* in the hands of any of the robbers. When the question was asked by the court, then he has stated that he had not identified any of the accused persons. He had further stated that when he had come back from Moradabad after three days, then after about 18 to 20 days, the Investigating Officer had inquired about the incident from him.

13. PW.4 is the Investigating Officer Matadin Yadav, who has stated that on 9.12.82 he was the Station Officer in Police Station, Rishikesh. The case was registered in the Police Station in his presence and he has started the investigation of the case. During the course of the investigation, he has recorded the statements of the accused and witnesses and prepared the site plan i.e. Ex.Ka.9. He has further stated that in the FIR, truck no.7510 was written but when he had inquired from the RTO Office, then he came to know that the said number was not the number of the truck. Then he came to know from S.I., Sri Niwas Sharma, that the truck number was UTL 8475 and the owner and driver of the Truck was Surjeet Singh and Gurdeep Singh. After completing the investigation, he had submitted the charge sheet i.e. Ex.Ka-10. In the cross-examination in para 5, he had stated that No.7510 belonged to a two wheeler scooter. He further stated that he had not seen the papers of the Truck No.8475 and he had inquired the matter from Gurdeep and Surjeet Singh after 20 to 22 days of the incident. He has further stated that the appellants Dhyan Singh and Malkhan Singh were not *Baparda* and they were not identified in the jail. He has further stated that he could not remember when S.I. Sri Niwas Sharma came back from Moradabad. He has further stated that he might have met him in the Police Station but he could not remember the same.

14. After that the statement of the appellants were recorded under Section 313 Cr.P.C. who had denied the allegations made against them. In defence they did not file any documentary evidence but in oral evidence, DW.1 Bakhtawar Singh was examined who has stated that he was the Pradhan on the date of the incident in the village Majari Grant. He has further stated that he was known to Dhyan Singh and his servant Malkhan Singh. Maya Ram was the Up-Pradhan in the Gram Sabha. He has further stated that appellants Dhyan Singh and Malkhan Singh were arrested by the police on 8.12.82 at 7.00 PM.

15. Learned counsel for the appellant has submitted that on the basis of the above said evidence and above said discussion, no case is made out against the appellant under Section 394/398 IPC. He has further submitted that the only evidence against the appellant is of S.I., Pati Ram Arya, and on the basis of the solitary evidence, it does not inspire any confidence and his statement is not reliable and believable statement and the case is not proved against the appellant. For the sake of convenience, Sections 394 and 398 IPC are reproduced as under :-

"394. Voluntarily causing hurt in committing robbery- ***If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.***

"398. Attempt to commit robbery or dacoity when armed with deadly weapon- ***If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.*****"**

16. From the evidence discussed above, it is clear that against the appellants, there was only evidence of PW.1 Sub Inspector, Pati Ram Arya who has stated in his statement that he was coming in a truck no. UTL 7510 from Doiwala to Nepali farm and when they reached near Chhidarwala, the road was blocked with the stones and four robbers came on the road. When the robbers saw the police persons inside the truck, then they had run away and then they had chased the robbers. The two robbers were arrested on the spot, they were present appellant Dhyan Singh and Malkhan Singh (now deceased). He has also stated that from the possession of appellant Dhyan Singh, one spear was recovered. This incident was happened about 9.45 PM on 8.12.82 and the FIR was lodged on 9.12.82 at 1.10 AM. Later on, it came out during the investigation that the number of the truck was not UTL7510 rather it was UTL8475. It also came in the evidence that this fact came into the knowledge of the investigating officer when he had recorded the statement of PW.2 Sri Niwas Sharma under section 161 Cr.P.C.

17. Learned counsel for the appellant further submitted that it creates a doubt in the prosecution story and also in the statement of PW.1 Pati Ram Arya that that the incident was happened like so as it was stated in the statement of PW.1 Pati Ram Arya. He further argued that when PW.1 Pati Ram was in the truck, then why he had not written the correct number in the FIR. By writing the wrong number in the FIR, the presence of S.I. Pati Ram on the place of occurrence of doubtful and thus, the prosecution story seems to be doubtful.

18. He has further submitted that the prosecution story is doubtful due to the reason that the above said truck number came out in the knowledge of Investigating Officer by recording the statement of PW.2 Sri Niwas Sharma who was boarded in the same truck from Raiwala to Moradabad on the same time about 10-12 Kilometers from Chhidarwala and he had gone to Moradabad for the investigation of some another case. He had come back to police station on 10.12.82 and he had not disclosed about the incident in the police station and even the truck number to the investigating officer of the present case and even when he was going towards Moradabad from Raiwala. Then in the Raiwala, Surjeet Singh and Gurdeep Singh told him about the said incident but he has not informed about the said incident to the Police Station Raiwala or to the Police Station Haridwar or in any other police station which has come in between and up to the Moradabad. Hence, it shows the unnatural conduct of PW.2 Sri Niwas Sharma, who was the Sub Inspector of Police but he had not taken any care about the said incident and even he has not told about the said incident to any police person or in the P.S. Rishikesh by any method or in the police stations came in the way up to the Moradabad. Even otherwise, it is surprising that when he had come back to police station, he had not informed about the correct truck number and about the incident in the Rishikesh police station. Further, he had not mentioned about the said incident in G.D. when he had reported back in Police Station Rishikesh after coming back from Moradabad. This conduct of PW.2 Sri Niwas Sharma also creates a doubt in the prosecution story.

19. PW.3 Surjeet Singh who was also cross examined and he had stated in his statement that he had not identified the robbers. He further stated that three robbers were armed with *dandas* and one was armed with rifle. It also shows a doubt that whether the appellant was armed with spear at the time of occurrence or not. From the statement of P.W.3 Surjeet Singh, it is not proved that any of the robbers was armed with a spear which also creates a doubt in prosecution story. Even otherwise, the investigating officer had not taken any step for the identification of the appellant in the jail and the appellant was not sent *Baparda* in the jail and not taken any precaution for taking *Baparda.* Thus, it also creates a doubt in the prosecution story.

20. Learned counsel for the appellant has further submitted that the recovery memo i.e. Ex.Ka.1 shows that the weapons i.e. spear and khukhri were recovered from the possession of appellants Dhyan Singh and Malkhan Singh and it was not specifically mentioned in the recovery memo Ex.Ka.1 that with whom possession the weapon spear was recovered and with whom possession the weapon *Khukhri* was recovered and thus, it also creates a doubt in the recovery of the above said weapons. He further stated that as per Section 394 of IPC, if the hurt is caused during the robbery, only then Section 394 IPC is made out. In the present case, since there was no hurt caused and even the two robbers had not tried to cause any hurt to the complainant party, hence offence under Section 394 IPC is not made out against the appellants. He has further submitted that since the prosecution has failed to prove that the appellants were armed with deadly weapons like spear and the recovery of spear is not proved from the possession of the appellants, hence, offence under Section 398 IPC is also not made out against the appellant. He further submitted the only evidence against the appellant is the solitary evidence of PW.1 and on the basis of the evidence it does not inspire any confidence. In support of this argument, he has cited a judgment reported in ***2003 (1) Supreme Court Cases, 465 "Joseph Vs. State of Kerala"***. He has relied upon para 13 of this judgment which is reproduced as under :-

"13. To our mind, it appears that the High Court did not follow the aforesaid standard but went on to analyse evidence as if the material before them was given for the first time and not in appeal. Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact and, therefore, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eyewitness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence. By this standard, when the prosecution case rests mainly on the sole testimony of an eyewitness, it should be wholly reliable. Even though such witness is an injured witness and his presence may not be seriously doubted, when his evidence is in conflict with other evidence, the view taken by the trial court that it would be unsafe to convict the accused on his sole testimony cannot be stated to be unreasonable."

21. Learned counsel for the appellants further submitted that the evidence of the solitary witness should be accepted with caution. He further submitted that it is permissible to record and sustain a conviction on the evidence of a solitary eyewitness. But, at the same time, such a course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit confidence.

22. For the discussion made above, the evidence of PW.1 S.I. Pati Ram Arya does not inspire any confidence and hence, his evidence is not reliable and believable evidence. Hence, no reliance can be put on the statement of P.W.1 S.I. Pati Ram Arya. Therefore, the conviction of the appellant above-said on the statement and evidence of S.I. Pati Ram Arya P.W.1 is not justified and as per law.

23. Learned counsel for the appellant has further cited a judgment of Hon'ble Apex Court reported in ***1994 Supreme Court Cases (Cri.) Page 46 "Joginder Singh and others Vs. State of Punjab".*** He has relied on para 3 of the said judgment, which is quoted below: -

"3. The accused denied the offence and stated that they were falsely implicated. The prosecution case rested on the evidence of PW3, the father of the deceased and PW4 who claimed to be an eyewitness. The trial court convicted six of the accused persons, as already stated. The trial court considered their evidence and observed that the possibility of false implication of three of the convicted accused cannot be ruled out. Having stated so, the High Court acquitted three of the accused. At more than one place, the High Court pointed out that the false implication of the acquitted accused cannot be ruled out. Without further discussion, the High Court convicted the three appellants solely on the ground that they had motive to attack. It may be mentioned that the evidence of PWs 3 and 4 is to the effect

that quite a few of the acquitted accused inflicted injuries with sharp-edged weapons. But their evidence is rejected in respect of other five accused solely on the ground that they could have been falsely implicated. In our view, the same reasoning applies to the case of the present appellants also. If that be the position, the appellants cannot be treated as a different category merely on the ground that they had motive and on that basis they could not have been convicted when the evidence of the eyewitness was found to be highly unsatisfactory. The High Court has committed an error in convicting the present appellants having rejected the evidence of the eyewitnesses in respect of the other accused."

24. On the basis of the aforesaid quoted judgment, learned counsel for the appellant has contended that on the basis of same set of evidence, co-accused Guljar and Baldev Singh have been acquitted by the trial court and the present appellant Dhyan Singh and deceased Malkhan Singh were convicted. He has further submitted that in view of the judgment of Hon'ble Apex Court in the case of Joginder Singh (Supra) on the basis of the same set of evidence the present appellant cannot be convicted when the order two other accused persons have been acquitted by the trial court on the same set of evidence.

25. On the basis of the discussions above and in view of the circumstances narrated above, the judgment and order dated 12/13.12.1983 passed by Additional Sessions Judge, Dehradun convicting the appellant Dhyan Singh to undergo seven years R.I. for an offence u/s 394 r/w Section 398 IPC cannot be sustained in the eye of law and as such is liable to be set aside.

26. For the reason recorded above, the appeal preferred by appellant Dhyan Singh is allowed. The judgment and order dated 12/13.12.1983 passed by Additional Sessions Judge, Dehradun is set aside.

27. CJM, Dehradun vide his report dated 4.7.2007 has informed that Appellant No.2-Malkhan Singh has died, hence the appeal against Appellant No.2- Malkhan Singh stands abated.

(Dharam Veer, J.)

August 27, 2007
Rajeev Dang